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Issue Date: 29 December 2005

In the Matter of

TEXAS WORKFORCE COMMISSION
Complainant

v.

UNITED STATES DEPARTMENT OF LABOR
Respondent

Case No. 2004-OAA-00001

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For the Complainant

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For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER GRANTING SUMMARY JUDGMENT

This case concerns a grant under the Older Americans Act ("OAA"), Title V, the Senior Community Service Employment Program ("SCSEP"), 42 U.S.C. §3056. The SCSEP enhances employment opportunities for older Americans and promotes older workers as a solution for businesses seeking employees. It distributes grants to states to provide job training and employment assistance to disadvantaged older Americans. Texas ("the State") designated the Texas Workforce Commission ("TWC"), a State agency, as the recipient of Title V funds (AF at 130[1]). The State also established the Senior Texans Employment Program ("STEP") to provide work training opportunities for low income Texans over age 55 and services to rural Texas communities. TWC contracts Title V funds to Farmers Union Community Development Association, Inc. ("Farmers"), a non-profit organization (AF at 130). STEP is funded through TWC and by Title V of the OAA, but is administered by Farmers.

[1] "AF" refers to the administrative file submitted to this office in this matter. It consists of three volumes that have been paginated consecutively.

Background

In 1999, Wes Simms, the Director of the Regional Farmers Union organization, found discrepancies between the Farmers audit and his own observations of the program. He reported his concerns to TWC, the United States Department of Labor ("DOL"), and law enforcement officials. As a result these allegations, the Farmers Board terminated its then executive director, Robert Girard. The following year the DOL Office of Inspector General ("OIG") began an audit of the Farmers program for the period of July 1, 1994 to June 30, 1999. During this five-year period, the average annual federal funds provided to STEP was $4.5 million (AF 354). The audit questioned $568,680 in costs (AF at 46). The Federal Bureau of Investigation ("FBI") was simultaneously conducting a criminal investigation of Girard. The State cooperated with these investigations by turning over the relevant documents and postponing its own action in the matter. Girard was charged under 18 U.S.C. §666(a)(1)(A) with theft concerning programs receiving federal funds. He pled guilty and was sentenced to 18 months and prison and ordered to pay restitution in the amount of $119,729.89.

The OIG completed its investigation and issued an audit report on March 14, 2003. The State reviewed the findings in the audit report and submitted its *State Resolution Report* to the Grant Officer (AF at 335-775). In that resolution report, the State determined that Farmers, its subrecipient, had misspent federal funds. The State's *Final Determination* disallows "$536,189.62 and tentatively allows $32,490.38, subject to approval by [the Grant Officer]" (AF at 335). The State requested a credit for the court-ordered restitution to be paid by Girard, and a waiver for the balance of the disallowed costs under 20 CFR § 627.704, which would reduce the State's liability to zero (*id.*). The State has focused on the waiver and has been unable to document or justify the $536,189.62 that it disallowed Farmers.

In its resolution report, the State does not dispute that the costs were properly disallowed. In fact, the Grant Officer's *Final Determination* (AF at 10) and *Revised Final Determination* (AF at 817) are based on the *State Resolution Report* (AF at 335-41) and the *Final Determination* issued by the State against Farmers (AF at 344-51). The State reviewed the available documentation from Farmers and determined that the costs should be disallowed (AF at 346). It found that only $32,490.38 were documented and justified. On numerous occasions, the State has admitted that charges are not documented, and there are invalid credit card charges (AF at 346), unauthorized expenditures (AF at 347), premium refunds (AF at 348), costs for other organizations (AF at 348), excess grant funds for bonuses and extra pay (AF at 349), and grant funds put to personal use (AF 350). *See also*, AF at 799-800, 803-05.

After receiving the State's resolution report, the Grant Officer issued an *Initial Determination* on February 26, 2004, which accepted the State's findings and disallowed $536,189.62 of the auditor's $568,680 in questioned costs. The Grant Officer forwarded a copy of the OIG's report to the TWC with instructions to resolve the questioned costs with its grantee (AF at 811-12). The State responded to the *Initial Determination*, and the Grant Officer issued a *Final Determination* on August 12, 2004 in which she again disallowed $536,189.62 in costs charged to OAA grants administered by Farmers. In her *Final Determination*, the Grant Officer accepted the State's findings about the disallowance against Farmers, but rejected its waiver claims. The Grant Officer found $416,459.73 subject to debt collection, accepting the State's

argument that the restitution Girard was ordered to pay should be applied against the State's debt. However, the Grant Officer rejected the State's request for a waiver of its liability for the remaining disallowed costs (AF at 23, 831). The State, in seeking waiver, was relying on a provision of the Job Training Partnership Act ("JTPA") that is not applicable to the OAA. Therefore, she denied the State's request (*id.*).

On September 10, 2004, the State appealed the Grant Officer's determination to this Office. Three days earlier, the federal district court had established a fixed payment schedule for Girard to make restitution to the Department (AF at 833-35). Because the Court was permitting Girard to pay the restitution in installments, the Grant Officer issued a *Revised Final Determination* on November 5, 2004 to take into account the modification of Girard's sentence. The Grant Officer again disallowed $536,189.02 in costs against the State (AF at 817-32). Additionally, the *Revised Final Determination* summarized the conditions of repayment in the August order, clarifying that the Department would not attempt to collect the $119,729.89 of court ordered restitution as long as Girard met the terms of the court order. If the former executive director does not comply with the court order, the Department will seek the amount he fails to repay from the State (AF at 817, 831-32). In all other respects, the *Revised Final Determination* is identical to the *Final Determination*. The Department now seeks summary judgment.

Standard for Summary Judgment

The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, found at 29 C.F.R. Part 18, provide that an administrative law judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. §18.40(d); *see also* Fed. R. Civ. P. 56(c).[2] Summary judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When applying this standard, the evidence and any reasonable inferences are considered in the light most favorable to the non-moving party. *See e.g., Kendrick v. Penske Transportation Services, Inc.*, 220 F. 3d 1220 (10th Cir. 2000).

The party who files a motion for summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact concerning its claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). This burden may be met by showing that there is an absence of evidence to support the nonmoving party's case. *See id.* Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact left for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[2] 29 C.F.R. §18.1(a) provides that the Rules of Civil Procedure for District Courts of the United States shall be applied "in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation."

Discussion

The Grant Officer moves for summary judgment on the ground that the State admits the challenged costs were not allowable, and thus there are no issues of material fact. The State claims that there are too many facts in dispute to resolve this appeal through summary judgment. First, the State argues that the United States chose to pursue debt collection through the prosecution of the former executive director of Farmers and should not be allowed to seek collection for a debt it compromised in a plea agreement. Alternatively, the State argues that it should not be liable for the amount owed by Girard. In other words, if Girard fails to pay the restitution, the Department may not collect that amount from the State. Second, the State claims that it detrimentally relied on the statements of the Grant Officer regarding the applicable provisions of law to be used in the audit and the Department should be estopped from changing its standard. Third, the State contends that the *Final Determination* was issued prematurely – before the completion of the audit procedure – as the Department failed to consider the State's request for a waiver. Finally, it contends that the Grant Officer failed to consider whether the losses fall within an allowable category of the OMB Circular No. A-122 ("OMB 122").[3] . Despite the State's categorization of these issues as factual, they are legal issues that can be decided in response to the Grant Officer's motion for summary judgment.

The Grant Officer argues that summary judgment is proper because the costs were properly disallowed under the appropriate cost principles. *See* OMB 122. The State did not dispute this fact in its Resolution Report (AF 335-41). In fact, the *State Resolution Report* was the basis for the *Final* and *Revised Final Determinations*. The State examined Farmers' records and was unable to justify the contested expenditures (AF at 346-50). There are repeated references in correspondence from the State regarding the disallowed costs or the lack of evidence to support the expenses. Record keeping is the burden of the State. *State of Louisiana v. U.S. Department of Labor*, 108 F.3d 614, 618 (5th Cir. 1997). The State is responsible for misspent funds. Even though embezzlement is not technically an expense, for purposes of the Act, embezzlement is one way a grantee can misspend its funds. *Board of County Commissioners v. United States Department of Labor ("Adams")*, 805 F.2d 366, 368 (10th Cir. 1986).

The State was not required to accept federal funds from the Department under this grant, but by electing to do so, it accepted the obligation to spend the funds in accordance with the Act, regulations, and appropriate cost principles. *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981). As the Supreme Court said. "[people] must turn square corners when they deal with the government." *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920). The Federal government entrusts grant recipients with public funds and requires them to discharge their duties in strict compliance with the requirements of the applicable statute in order to fulfill that public trust. *State of Louisiana*, 108 F.3d at 620. Further, it is the state's responsibility to maintain its records and be able to document its expenditures as reasonable and allocable. *Montgomery County, MD v. Department of Labor*, 757 F.2d 1510, 1513 (4th Cir. 1985); OMB 122, Attachment A.2 (AF at 321). Failure to do so makes it liable for the costs. Grant recipients and subgrantees who fail to meet their obligations dishonor and disserve the public trust. *Id.*

[3] Excerpts from Circular A-122 are found at AF pp. 317-34. I take judicial notice of the other sections of OMB Circular No. 122 which are discussed in this decision.

The Grant Officer argues the *Revised Final Determination* is valid, and the State has conceded that the costs were unallowable; therefore, summary judgment is appropriate.

In its response to the Grant Officer's *Motion for Summary Judgment*, the State first claims it is unable to make a defense due to the unreasonable delay of the federal government in collecting the debt and the State's cooperation with the federal investigation. The State alleges that because it cooperated with the federal investigation, it does not know what files were given to the federal government or if they were all returned. However, the State's contention is a smoke screen. For this is not a situation where delay has caused the records of permissible expenditures to be lost or destroyed. Rather, the records never existed in the first place. But even if records had existed at one time, virtually all of the disallowed expenses relate to funds which either were embezzled for Girard's personal use or otherwise were spent illegally, and the existence of records documenting these expenses would not have legitimized them. Accordingly, if the State is unable to make a defense, it is not due to delay by the federal government.

Nor is it due to a lack of opportunity. The State admits that funds were embezzled by the former executive director, and properly classified these costs as disallowed (s*ee State Resolution Report*, AF at 335 *et seq*.). In a 400-plus page document, the State explained how the grant funds were misspent and that Girard did not maintain records of the expenditure of funds. The State, in its misplaced reliance on a waiver provision of the JTPA, was expecting to get the amount of the disallowance excused by the federal government. The Grant Officer denied the waiver, so now the State argues that the embezzled money is an allowable cost.

The State now maintains that the expenses are allowable because the funds were stolen. It claims that it is not liable for embezzlement and *Adams* does not apply to this case. It further argues that the wrong standards were applied, and under OMB 122 it is not liable for the costs. The State argues that *Adams* is inapplicable because the subgrantee was responsible for the embezzlement, not the State. In *Adams*, the court held that funds embezzled by an employee of a CETA grantee are "misspent" for purposes of the government's right of recovery. 805 F.2d 366 (10th Cir. 1986). While the grantee argued that the funds were not "misspent" as they were never spent, the court stated that "[n]o CETA regulations lists [*sic*] embezzlement as an allowable cost." *Id.* at 368. The State seeks to factually distinguish *Adams* from the present case. It argues that the Department was seeking repayment from the employer of the individual who committed the embezzlement in *Adams*, but here they are seeking it from TWC, not the embezzler's employer, Farmers. This distinction is irrelevant. A State is liable for the subgrantee's misuse of funds. *Ledbetter v. Shalala*, 986 F.2d 428 (11th Cir. 1993). In *Ledbetter*, a Georgia non-profit sub-grantee allegedly misspent funds and the federal government was attempting to recover the money from the state of Georgia. The Court held that the federal government could recover funds from the State if the sub-grantee misspent them. *Id.* at 434.

The State's next argument appears to be that OMB 122 was not applied properly in regard to the embezzled funds. In its response to the motion for summary judgment, respondent contended that OMB 122 "provides that actual losses are allowable if the losses could not be covered by permissible insurance." *Texas Workforce Commission's Response to Grant Officer's Motion for Summary Judgment* at 10. It appeared that the respondent was arguing that the embezzlement was not something that could be insured against, and therefore under OMB 122 the embezzled funds should be an allowable cost. There are two problems with this contention.

First, OMB 122 does not state what the respondent alleges it does. OMB 122, at Attachment B, §22(a)(3), states "[a]ctual losses which could have been covered by permissible insurance (through the purchase of insurance or a self-insurance program) are unallowable…." Stating that losses are unallowable if not insured against when they could have been, is not the same as stating losses are allowable if they could not be insured against. Second, as respondent belatedly remembers in its *Suppliment* [*sic*] *to the Texas Workforce Commission's Response to Grant Officer's Motion for Summary Judgment*, Farmers actually had employee dishonesty insurance, in the amount of $150,000.00 (*see* AF at 336, 360, 765). In the supplemental response to the motion for summary judgment, citing both OMB 122 Attachment B, §22(a)(3) and OMB 122 Attachment B §6,[4] the State argues that any losses suffered by Farmers and TWC which exceed the amount of the insurance coverage should not be disallowed. But neither of these sections of OMB 122 even suggest such a conclusion. Since Farmers had insurance, OMB 122 Attachment B §22(a)(3) is not applicable; and OMB 122 Attachment B §6(c) simply states that costs of obtaining a bond are allowable.

The State next argues that it is entitled to a waiver of the disallowed costs under 20 C.F.R. 627.704 and that the Department should be estopped from changing its position on the availability of a waiver. This argument has no merit. First, the Grant Officer told the State that it would use the audit resolution procedures in 20 C.F.R. 627.481 to resolve the audit. The letter informing the State of this decision was very specific. The letter states, "[t]he Grant Officer plans to handle the resolution of this State Older American Act, Title V audit in accordance with the procedures set forth in 627.481 for JTPA/WIA subrecipient audits" (AF at 811). The State repeatedly asserts it was informed the Job Training Partnership Act ("JTPA") would be used to resolve the audit, but this is not what the Grant Officer said. The Grant Officer simply stated that a single section of the JTPA regulations, which sets out audit resolution procedures but contains no substantive provisions regarding the auditing of grants, would be followed. The State would have had a better (but still unsuccessful) argument for a waiver if the Grant Officer had said the regulations governing audits under the JTPA would be utilized, but she did not make such a general statement. Contrary to the State's understanding of the situation, the Department has not changed its position on the applicable resolution provision. Section 627.481 does not provide for waiver of disallowed costs. Moreover, respondent's argument that the disallowance of costs under OAA can be waived under §627.704 is invalid on its face. For §627.704 refers specifically to §164(e)(2) of the JTPA as authorizing waivers. It is obvious that this section could not apply to an audit under a different statute. Moreover, OAA has no similar provision.

However, even if the State's waiver argument was correct, it is only entitled to *ask* for a waiver. The requirements in 20 C.F.R. 627.704 allow a State to request a waiver from the Department. The regulation says "a recipient *may request* a waiver of liability" and "[a] wavier of the recipient's liability *can only be considered* by the Grant Officer when the misexpenditure of JTPA funds" meets five requirements. 20 C.F.R. 627.704(a) and (c) (emphasis added). The State claims that it detrimentally relied on the availability of a waiver. If so, the State was acting imprudently; for even if a waiver was permitted under the OAA, whether to grant a waiver is discretionary. Further, detrimental reliance requires a party to put faith in a "definitive

[4] OMB 122 Attachment B §6(c) states that *"[c]osts of bonding* required by the non-profit organization in the general conduct of its operations *are allowable* to the extent that such bonding is in accordance with sound business practice …." (Emphasis added).

misrepresentation." *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984). Assuming the Grant Officer's statement that 20 C.F.R. 627.481 meant that all of the JTPA could be used for the audit, it only gives the State the possibility of a waiver. A possibility is not definitive. The State's reliance on the waiver was misplaced.

The State's final argument is that the Department violated its due process rights. It contends first that it was prohibited from appealing the *Revised Final Determination*, which is obviously incorrect and in any event irrelevant. The *Revised Final Determination* is identical to the *Final Determination* except for a change in the remedy being imposed. Therefore, even if the State is not being permitted to appeal the *Revised Final Determination*, by appealing the *Final Determination* the State is appealing all of the disallowances in the *Revised Final Determination* as well. But the State is being permitted to appeal the *Revised Final Determination*. As the Grant Officer stated in its letter to TWC forwarding the *Revised Final Determination*, since it is simply a clarification as to the restitution at issue here, "no *new* appeal rights are noted herein and this *Revised Final Determination* will be filed in the current OALJ proceeding…" (AF at 815 (emphasis added)). In other words, the Grant Officer was informing TWC that there was no reason to separately appeal the *Revised Final Determination*, which was being consolidated with the appeal of the *Final Determination*. Not only did the Department not prohibit an appeal of the *Revised Final Determination*, but it deems the revision to be appealed without the necessity of formally appealing it by including it in the pending case.

Second, the State contends that the *Revised Final Determination* violated due process in that the *Final Determination* was revised to punish the State for appealing the Grant Officer's determination. This contention is absurd. The *Final Determination* clearly was revised in response to the court's amended restitution order for Mr. Girard. The only difference between the *Final Determination* and the *Revised Final Determination* is that the *Revised Final Determination* subjects the entire $536,189.62 disallowed to debt collection, but defers collection of the amount to be paid as restitution (AF at 814), whereas the *Final Determination* presumed that the restitution would be paid up front and did not need to be subject to debt collection.

That the Grant Officer has the authority to revise her determination is well-recognized. *Trujillo v. General Electric Company*, 621 F.2d 1084, 1086 (10th Cir. 1980); *Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002). The appropriateness of a reconsideration depends largely on how the reconsideration will affect the individuals involved. *McAllister v. United States*, 3 Cl. Ct. 394, 398 (Cl. Ct. 1983). Factors also include whether the parties have changed their positions and the reasonableness of any modification. The *Final Determination* was made on August 12, 2004, and the modification to Girard's repayment schedule was set up on September 7, 2004. The *Revised Final Determination* was issued on November 5, 2004, which is reasonably expeditious. The State has presented no evidence that it changed its position or was prejudiced by the issuance of the *Revised Final Determination*. Since the State has not shown it relied on the *Final Determination* or is adversely affected by the issuance of the *Revised Final Determination*, I find the *Revised Final Determination* to be a valid and reasonable exercise of the Grant Officer's authority.

In its conclusion to its *Response to the Grant Officer's Motion for Summary Judgment*, the State, arguing that summary judgment is inappropriate in this case, lists five allegedly factual disputes to be resolved at a hearing. First, the State claims that the federal government should be

precluded from collecting a debt from it, because the State already attempted to collect the debt from Girard through a criminal prosecution. But the State cites no statute or case law that supports this contention. Girard embezzled federal funds, and it is well within the federal government's right to prosecute him for this crime. That Girard was prosecuted for embezzlement does not change the fact that funds under an OAA grant were misspent by the State, and the Department of Labor would be remiss if it failed to recover all of the misspent funds. There is no material fact in dispute regarding this issue.

Second, the State argues the Department should not require it to repay the amount of money subject to restitution by Mr. Girard. Again, the State offers no law in support of this proposition. The Department is not attempting to collect the same disallowed costs twice, both from Girard and the State. Instead, it is simply insuring that all the misspent funds are repaid. Only if Girard defaults on his obligation to pay the $119,729.89 in restitution will the State be required to pay it. In actuality, the State is fortunate that restitution was part of Girard's sentence, and that it may not have to repay the entire sum that was disallowed. Further, the State is not precluded from pursuing its own causes of action against Mr. Girard or the subgrantee to recover the misspent funds; and in its *Resolution Report* TWC indicated that it has filed a claim for $150,000.00 under an employee dishonesty insurance policy Farmers had taken out. *See* AF 336, 360, 765. There is no material fact in dispute regarding this issue.

Third, the State would like to present evidence at a hearing showing that it detrimentally relied on the JTPA waiver provision. But waiver of the disallowed costs was never a possibility under OAA, and the Grant Officer did not indicate that it was. If respondent thought that it could receive a waiver of the disallowed costs, it was based on its own erroneous conclusion, not on anything that was said by the Grant Officer. Even if the State's understanding of the audit provisions to be utilized was correct, a waiver is discretionary, and the State's reliance on obtaining a waiver was misplaced. Finally, I have read the five affidavits attached to the State's response to the Grant Officer's motion for summary judgment, and I am aware that each of the affiants states that if he or she knew that the JTPA waiver provision was inapplicable "TWC would not have followed the JTPA resolution process at the state level . . . ." (*E.g.*, affidavit of Gilbert Martinez). However, since the State admits to the embezzlement and other improper expenditure of the grant funds, it is hard to conceive how using a different grant resolution process could have produced a different result. There is no material fact in dispute regarding this issue.

Fourth, the State contends the *Final Determination* was premature. It wants the determination to be withdrawn in order for the Grant Officer to consider a waiver and whether the costs were allowable under OMB 122. But all three determinations by the Grant Officer – the *Initial Determination*, the *Final Determination*, and the R*evised Final Determination* – address the waiver issue (AF 23, 39, 831) and rely extensively on OMB 122 (*see supra*). This contention is specious, and there is no material fact in dispute regarding this issue.

Finally, the State says there is a question of fact regarding the denial of due process by the issuance of the *Revised Final Determination*. But the *Revised Final Determination* was identical to the *Final Determination* except for a change in the debt collection status of the $119,729.89 subject to court-ordered restitution. This proposed change to the ultimate remedy, which was contingent on the Grant Officer proving her case, had no effect whatsoever on the

respondent's ability to contest the disallowance of costs by the Grant Officer. There is no material fact in dispute regarding this issue.

Accordingly, I find that summary judgment is appropriate, and the Grant Officer's *Motion for Summary Judgment* is hereby granted.

ORDER

The *Revised Final Determination* of the Grant Officer, dated November 5, 2004, is affirmed. Texas Workforce Commission shall pay the U.S. Department of Labor, from nonfederal funds, the sum of $416,459.73. If Robert Girard fails to pay all or part of the $119,729.89 in restitution which is part of his criminal sentence, the Texas Workforce Commission is liable for the outstanding restitution payments as well.

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JEFFREY TURECK
Administrative Law Judge